FRANK ASKS COURT FOR REHEARING ON TWENTY-ONE POINTS

Attorneys Rosser, Arnold, Haas and Haas File Motion With

Supreme Tribunal Asking a

Rehearing of Appeal

DELIEVED DECISION WILL

COME DOWN SATURDAY

Judge Roan’s Refusal to

Charge Jury on Points Cited

by Defense Basis of One of the Attacks

Leo M. Frank's attorneys, Luther Z. Rosser, Reuben R. Arnold, Herbert and Leonard Haas, filed Frank's motion for a rehearing with the state supreme court Tuesday morning. Out of 106 grounds contained in the original bill of exceptions the motion asks the court to hear a re-argument on twenty-one grounds, which, it is contended, the supreme court overlooked in deciding the case.

After setting out each ground, which is quoted in full from the record, the motion recites: "Said ground just quoted set up material facts constituting error in said case, which the court in the decision rendered overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as disclosed from an inspection of the ground here quoted, was material."

Owing to the fact that the present (October) term of the supreme court ends on Saturday of this week, it is believed that the court will pass upon the motion for a rehearing before Saturday. Should it not do so, it will be compelled to recall its judgement rendered in the decision of last Wednesday and suspend same until it finally disposes of the rehearing motion.

MAY RECALL JUDGEMENT.

In the event the court allows a rehearing, but does not find time to go into one this week, it will recall its judgement and carry

the case over into the March term, which begins next Monday. Under such circumstances the remitter, which is due to be sent down to the superior court, will be held up until the points involved in the rehearing motion are decided.

Out of the twenty-one grounds upon which the defense asks for a rehearing only four, it is pointed out, were touched upon by the supreme court, and these four, it is contended, were not given the full consideration desired by the defense. Following are the grounds upon which a rehearing is asked:

JUDGE ROAN'S CHARGE.

Ground 67—"Because the court erred in failing to charge the jury that if a witness knowingly and willfully swore falsely in a material matter, his testimony shall be rejected entirely, unless it be corroborated by facts and circumstances o the case or other creditable evidence.

"The court ought to have given this charge, although no written request was formally made therefore for the reason that as to aiding Frank in the disposal of the body, was attacked by the defendant as utterly unworthy of belief, and he admitted upon the stand that he knew he was lying in the affidavits made by him, with reference to the crime and before the trial.

"Especially ought this charge to have been given, because the court, in his charge to the jury, left the question of the credibility of witnesses to the jury, without any rule of law to govern them in determining their credibility."

MISS CATO'S TESTIMONY.

"Ground 58. Because the court permitted the witness, Miss Cato, over the objection of the defendant that the same was incompetent, illegal and immaterial, tot testify substantially as

follows. ‘I know Miss Rebecca Carson. I have seen her go twice into the private ladies’ dressing room with Leo M. Frank.’”

“The court permitted this testimony over the objection of the defendant made as is aforesaid and in doing so committed error. The court stated that this evidence was admitted to dispute the witness they had called.”

“It was wholly immaterial to the issues involved in the case whether Frank did or did not go into a private dressing room with Miss Carson. It did, however, prejudice the jury as indicating Frank’s immorality with reference to women.”

MAGGIE GRIFFIN’S STATEMENT.

“Ground 59. Because the court erred in permitting the witness, Maggie Griffin, to testify over the objection of the defendant made when the testimony was offered that the same was immaterial, illegal and incompetent, to testify substantially as follows:”

“I have seen Miss Rebecca Carson go into the ladies’ dressing room on the fourth floor with Leo M. Frank. Sometimes it was in the evening and sometimes in the morning during working hours. I saw them come in and saw them come out during working hours.’”

WHAT NEWT LEE TOLD.

Ground 1.—“Because the court erred in permitting the solicitor to prove by the witness, Lee, that the detective, Black, talked to him—the witness—longer and asked him more questions at the police station than did Mr. Frank the day when he talked to the witness, Lee, at 12 o’clock at night on April 29.”

Ground 2—“Because the court erred in permitting over objections the witness, Lee, to testify that Frank, on April 29,

when alone with him at the station house, talked to him a shorter time than did Mr. Arnold, one of Frank's attorneys, when he interviewed the witness just before the trial."

FRANK EMPLOYS COUNSEL.

Ground 7—"Because he court, over objection made when the evidence was offered that the same was irrelevant, permitted the witness, Black, to testify that Frank had counsel, Messrs, Rosser and Haas, about 8 or 8:30 o'clock Monday morning while Frank was in the station house, brought there by Detectives Black and Haslett."

"Movant contends the employment of

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counsel, under the circumstances was no evidence of guilt; but the court's conduct in submitting the fact to the jury was greatly hurtful to the defense."

MRS. WHITE'S EVIDENCE.

Ground 16—"Because the court, over objection of the defendant, made at the time the evidence was offered, that the same was irrelevant, immaterial and not binding on Frank, permitted the witness. Mrs. White, to testify that Arthur White, her husband, and Campbell are both that she never reported seeing the negro on April 26, 1913, which she testified she did see in the pencil factory to the city detectives until May 7, 1913."

Ground 23—"Because the court permitted, over the defendant's objection, made when the testimony was offered, that it was illegal, immaterial, and because it could not be binding on the defendant, the witness S. L. Rosser, to testify that since April 26, 1913, he had been engaged in connection with this case; that he visits Mrs. Arthur White subsequent to April 26; that the first time the witness ever claimed to have seen the negro at the factory when she went into the factory on April 26 was some time about the 5th or 7th of May."

ATTACK ON SCOTT.

Ground 26—"Because the court, in permitting the witness, Harry Scott, to testify over the objection of defendant, made at the time the testimony was offered that the same was irrelevant, immaterial and not binding upon the defendant; that he did not get any information from anyone connected with the National Pencil company that the negro Conley could write, but that he got his information as to that from entirely outside sources, and wholly disconnected with the National Pencil company."

Ground 27.—"Because the court permitted the witness, Harry Scott, to testify over the objection of defendant, that the

witness first communicated Mrs. White's statements about seeing a negro on the street floor of the pencil factory on April 26, 1913, to Black, Chief Lanford and Bass Rosser, that the information was given to the detectives on April 28."

MISS HALL'S TESTIMONY.

Ground 32.—"Because the court erred in declining to allow the witness, Miss Hall, to testify that on the morning of April 26, and before the murder was committed. Mr. Frank called her over the telephone, asking her to come to the pencil factory to do stenographic work, stating at the time he called her that he had so much work to do that it would take him until 6 o'clock to get it done."

"Defendant contends that this testimony was part of the res gestae and ought to have been heard by the court, 26, were at the restaurant immediately contiguous to the pencil factory, and after they had left the factory at 11:45 o'clock a. m., and had had lunch, that Lemmie Quinn came in and stated that he had just been up to see Mr. Frank.

"Upon motion of the solicitor, this statement that he had been up to see Mr. Frank was ruled out as hearsay."

"This statement of Lemmie Quinn was a part of the res gestae, and was not hearsay evidence, and was material to the defendant's cause."

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TESIMONY ABOUT CLOCK.

Ground 55—"Because the court permitted the witness, L. T. Kendrick, over the objection of the defendant, made at the time

the evidence was offered, that the same was irrelevant, immaterial and incompetent, to testify substantially as follows:”

“‘The clock at the pencil factory, when I worked there, needed setting about every twenty-four hours. You would have to change it from about three to five minutes, I reckon.’”

“Kendrick had not worked at the factory for months, and whether or not the clock was correct at that time was immaterial and tended to confuse the jury in their effort to determine whether or not the clock was accurate upon the date of the tragedy.”

Ground 54—“Because the court permitted the witness, Scott, to testify in behalf of his agency, over the objection of the defendant, that the same was irrelevant, immaterial and incompetent, substantially as follows:”

“‘I got hold of the information about Conley knowing how to write through my operatives that I had investigating while I was out of town. McWorth told me in person when I returned.’”

“‘This was prejudicial to the defendant, because the solicitor contended that the failure of Frank to report the fact that Conley could write was a circumstance against Frank’s innocence, and he sought to show by the above testimony that the detectives were forced to get that information from some one other than Frank.”

TESTIMONY OF GANTT.

Ground 53. Because the court permitted the witness, J. M. Cantt, over the objection of the defendant made when the evidence was offered that the same was irrelevant and immaterial, to testify substantially as follows:

“The clock of the pencil company was not accurate. They may vary all the way from three to five minutes in twenty-four hours.”

Ground 42. “Because the court permitted McWorth, at the instance of the solicitor general, to testify over the objections of the defendant, made when the evidence was offered, that the same was irrelevant, immaterial and illegal:

“I reported it (the finding of the club and envelope) to the police force about seventeen hours afterwards. After I reported the finding, I had a further conference with the police about it four hours afterwards. I told John Black about the envelope and the club. I turned the envelope and club into the possession of H. B. Pierce.”

“This was prejudicial to the defendant, because the solicitor general contended that his failure to sooner report the finding of the club and the envelope to the police were circumstances against Frank. These detectives were not employed by Frank, but by Frank for the National Pencil company, and movant contends that he is not bound by what they did or failed to do. The court should have so instructed the jury.”

PERMITTED MONTAG TO TESTIFY.

Ground 35. “Because the court permitted, at the instance of the solicitor general, the witness, Sig Montag, to testify over the objection of the defendant, made when same was offered, that same was irrelevant, immaterial and incompetent; that the National Pencil company employed the Pinkertons; that the Pinkertons have not been paid, but have sent in their bills; that they sent them in two or three times; that, otherwise, no request has been made for payment, and that Pierce, of the Pinkerton agency, has not asked the witness for payment.”

“The introduction of this evidence was prejudicial to the defendant, for the reason that the solicitor contended that the pay due the Pinkertons by the Pencil company was withheld for the purpose of affecting the testimony of the agents of that company.”

ADDITIONAL RULING ASKED.

The four grounds upon which the defense asks for additional rulings follow.

1. The alleged influencing of the jury by demonstrations in the courtroom during the trial, and cheering on the outside while the jury was being polled. The plaintiff in error contends that in rendering its decision on this point the supreme court overlooked the case of Collier vs. the State, in which disorder occurred in the hearing of the jury, and the high court held that because of this fact the defendant did not have a fair and impartial trial in the manner contemplated by law. Other cases cited are the Wolfolk case and the Smith vs. Lovejoy case, it being contended that the decision in the Frank case was contrary to the decisions in the three other cases cited.

2. The testimony of the witness Owens, who declared that he had known the English avenue car, upon which it was alleged Mary Phagan rode into the city on the day of the murder, to reach the center of the city two minutes ahead of time. It is pointed out in the motion for a rehearing that “Owens’ testimony deals wholly with transactions occurring after the murder. Whether the English avenue car, scheduled for Broad Street at 12:07, got there on time on April 26 is the issue.”

3. The ruling of the supreme court to the effect that Conley having testified that Frank had remarked to him that he was not built like other men—it being inferable that the person who did the killing sought to have natural or unnatural relations with the deceased—it was relevant to explain the expression quoted by

showing previous transactions of the accused. “The plaintiff in error submits that, in as much as the alleged remark made by the accused, according to Conley’s testimony, was no evidence of any sexual act and was indeed no evidence of any transaction between the accused and deceased; that it could not be explained or made the basis for the evidence of other unnatural crimes as testified to by the witness Conley.”

JUDGE ROAN’S REMARKS.

4. “Plaintiff in error shows that in the nineteenth head note the court recites that where the order overruling the motion for new trial contains nothing which could indicate that the judge was dissatisfied with the verdict or that he failed to exercise his discretion, the supreme court will not, in determining whether the judge has exercised such discretion, consider oral remarks by him, pending the disposition of the motion.’”

“Plaintiff in error contends that the remarks made by the judge, which form the basis of the ground under consideration, were not merely made pending the disposition of the motion for new trial, but were part of the oral judgement delivered by the court, disposing of the motion. They were as much a part of the decision of the motion for a new trial as that part of the decision which denied the new trial, and it so appears in the bill of exceptions, and plaintiff in error contends that the court overlooked this feature of the record.”

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CONLEY CONVICTED; GETS YEAR IN GANG

PDF PAGE 1, COLUMN 6

HAIR STORY

RIDICULED BEFORE JURY

Solicitor Declares That Proof

Abundant Was Given in Trial

of Frank That Hair Found on

Lathe Came From the Head

Of Mary Phagan

JURY DELIBERATES FOR

ONLY FIVE MINUTES

Negro Factory Sweeper Who Has Already Spent Ten Months in Jail is Given the Extreme, Sentence for His Part in the Crime

Jim Conley, the negro, was found guilty as an accessory after the fact of Mary Phagan's murder by a jury in the criminal division of the superior court Tuesday morning after five minutes' deliberation, and was sentenced by Judge Ben H. Hill to twelve months in the chain-gang.

The feature of the trial was a sensational speech by Solicitor General Hugh M. Dorsey who, after recounting evidence given at

the Frank trial, declared that the evidence abundantly establishes the fact that the hair found on the lathe in the metal room did come from Mary Phagan's head.

RIDICULES DR. HARRIS.

He ridiculed Dr. H. F. Harris' opinion that the hair was not the slain girl's and he insinuated that the defense of Frank was afraid to ask the state's witness, Dr. Harris, about the hair, otherwise the defense would have elicited Dr. Harris' opinion as he got the opinion of Frank's witness, Magnolia Kennedy, on the same point.

When the trial of the case was resumed at 9 o'clock Tuesday morning, Albert McKnight, the negro wanted by Solicitor Dorsey as a witness, had not been located by the score of detectives who have been searching for him, and Mr. Dorsey, who later intimated that he feared that Conley would disappear as McKnight has one, if given his liberty, told the court he was ready for the argument.

FELONY CHARGE RULED OUT.

Judge Hill then stated that he would eliminate the felony indictment from the proceedings, and let the trial proceed on the misdemeanor indictment, which carried with it as an extreme penalty only one year in the chain-gang. Later in the charge he explained his reason for this ruling that, in his opinion, the facts in this case did not come under the definition of an accessory after the fact, when the act is a felony. The law in such a case, as construed by Judge Hill, is that a person must harbor or conceal a person convicted of a crime; in other words, the law practically covers only the case where a convicted felon is received, after his escape, and is hidden from the officers of the law.

A phase of the court's charge which

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JUDGE BEN H. HILL RULES OUT FELONY INDICTMENT TODAY

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has an important bearing on the Frank case was Judge Hill's statement as to the defense for an accessory after the fact of murder.

Judge Hill pointed out that the introduction of the jury's verdict in the Frank case is proof of Frank's conviction, but is only prima facie evidence of his guilt, and it was in the province of Conley, if he so desired, to introduce testimony to show that, despite his conviction, Frank is not a guilty of the crime.

"If he (Conley)," said Judge Hill, "had raised a doubt in your minds as to the guilt of Frank, then you should give him the benefit of the doubt and dismiss the charge of accessory. While it was open to him as a defense, Conley has admitted the guilt of the principal."

THE LAW IN CASE.

Judge Hill then proceed to construe the law as to an accessory after the fact. He declared that mere silence as to knowledge of a crime does not mean that a person is an accessory, but after he has full knowledge of a crime defendant must make some affirmative act of assistance to the principal, such as moving the body or writing notes to throw the body or writing notes to throw the officers of the law off the track.

The code says that to be guilty as an accessory after the fact a person must conceal a crime from a “magistrate.” The word does not mean a judicial officer, Judge Hill said, but authorized officers of the law as well.

Attorney William M. Smith, who conducted the defense of Conley, in his opening argument, cited much law to the court, and outlined his defense for the benefit of the jury and court.

Argument was limited to one hour to the side, and Mr. Smith consumed most of his time in conclusion.

Solicitor Dorsey spoke only half an hour. He said in part:

DORSEY’S ARGUMENT.

“The indictment against Conley involves two propositions. First, that Leo M. Frank is guilty of the murder of Mary Phagan; second, that Conley had knowledge of the crime and concealed it from the officers of the law and assisted, harbored or protected Frank.”

“As to the guilt of Frank we have here the indictment charging him with the crime, and the verdict of twelve as good and as honest men as you or I (despite the slurs which have been cast against them), who found Frank guilty as charged.”

“Frank is now a convict with a sentence of death standing against him, and the execution of this sentence needs only a word from the judge fixing the date.”

“That verdict, as far as this case is concerned, is not conclusive, but here counsel for the defendant as well as the state admits his guilt.”

“In this case the state not only has the adjudication of twelve good men, and the admission of counsel, but it has introduced a good deal of evidence, going to show that Frank murdered Mary Phagan.”

FRANK DENIES CONELY’S EVIDENCE.

“The principal part of this evidence goes to corroborate Jim Conley. No man has denied Jim’s statements except the convict, Frank.”

“The first person to corroborate Conley is Mrs. White, who says that when Frank went to the third floor, after telling her that he wanted her out of the building, that she came down the steps and saw a negro sitting where Conley says he was. He was of the size and general appearance of Conley. Frank denies Conley’s tale, Mrs. White sustains him. Tillander and Graham, two white men saw Conley at 11 o’clock, when he was waiting there to protect Frank, and they sustain his story.”

“In addition, certain physical facts sustain Conley. The undisputed evidence is that exactly where he says he dropped the body, that blood spots were found.”

“They say—not Mr. Smith, for he concedes the fact—that it might have been the blood of a mouse. But it was human blood.

The blood of Mary Phagan, put there when Jim Conley was aiding this convict and consummate actor, Leo M. Frank. Dr. Smith says it was human blood. Chief Beavers says it was blood. So does Harry Scott, and Mell Standford says it wasn't there Friday evening."

"Another physical fact in addition to the blood. Barrett found hair on a lathe in the metal room–he found several strands of it. The question arises how did it get there? If it were permissible, legal and awful, I would tell you whose hair I think it was and how it got on the lathe. But I am not permitted to give my opinion, but I can ask you what you think."

"Grace Hix, a companion and friend of the dead girl, says she identified the body as it lay cold and lifeless on an undertaker's table in this very building here, by the long, thick hair that was hanging over the table."

"Neither Grace nor Barrett says it was Mary's hair on the lathe, but Barrett says it was not there Friday, and Grace says it looked like Mary's. I have read to you the testimony of Magnolia Kennedy, a witness for Frank, and this girl says, "in my opinion it was Mary's."

"We drew this statement from their witness on cross-examination, because we were not afraid at any time to go out and get the truth."

"Gheesling tells you that he washed the hair with pine tar soap and it changed the color. There are three propositions to hair. Color, size and texture. You might as well say that hair is or is not from the head of a certain person after you have made a microscopic examination of a cross section, as to take cross sections of two trees and say from the examination whether or not they came from the same field."

HAIRS DIFFER ON SAME HEAD.

“We know that on the heads of some women there are three different colors to one hair.”

“A woman can wash her hair with pine tar soap and change the color. We know that there is difference in the color of a hair of live person and the same hair after the person has been dead and buried several weeks. When that hair was left on the lathe it had come directly from the head of a live person. When hair was taken from Mary Phagan’s body, after it had been buried three weeks, that hair had been changed by a washing of pine tar soap. The oil had all been washed out of it, and it had been under the ground for weeks. Hair on a dead body is different in size. The taking of a cross section of hair from a dead body and comparing it with the hair taken from the head of a live person, where the hairs as life, air and nourishment and oil, is ridiculous.”

“So, I say that this evidence abundantly establishes the fact that the hair found on the lathe was Mary Phagan’s.”

The solicitor then picked up the notes found by Mary Phagan’s body, and continued, saying: “Thank God that Jim Conley did drink that whisky after he left the factory, and that after he got out from under the influence of this convict Frank, he didn’t go back to burn the body and notes.”

“These notes have enabled the police to fasten the crime on its perpetrator, Frank, through Conley, although Frank should have been convicted even if Conley had never opened his mouth.”

“Conley knew that Frank murdered the girl, and he protected him by lying in statement after statement and by writing the notes and hiding the body.”

NO MYSTERY.

“I take no pleasure in prosecuting Conley. It is a pity that all could not be put on Frank. He murdered Mary Phagan and he was really the man at work when he made Conley write the notes and carry the body to the basement. This so-called mystery, which is not a mystery, but simply a dastardly crime, is worse than the ordinary crime, because Frank not only took Mary Phagan’s life as she struggled for her virtue, but he would have put that man’s (pointing to Conley) head in a noose to cover up his own crime.”

“I feel kindly towards Jim, and if my duty and the law and the facts did not demand that he pay the penalty for his share in the crime I would say let him go free.”

“Yes, let him go like Albert McKnight has gone. I wouldn’t care how far he went or whose money carried him on the way.”

“But we all have a duty to the state. I have mine. You have yours. We all, Jew and Gentile alike, have our duty tot eh state, and the law says that if Conley has assisted in this murder, he must bear the penalty. There is but one verdict in this case, and that is that Jim Conley is guilty.”

Attorney Smith commenced his opening argument by saying that he had expected the solicitor to tell wherein Conley was an accessory after the fact, and under what definition of law the state claimed him guilty.

“Instead he had branched off into a discussion of the texture of hair and other things foreign to the case.”

Mr. Smith then launched into his argument for the negro, pleading to the jury that when Conley carried the body down to the basement and when he wrote the notes he did not know that a murder had been committed.

FRANK’S CASE.

He contended that when the only thing that Frank knew about the crime was Frank's own statement to him that he, Frank, had struck the girl with his fist and that she had fallen, striking her head. Frank made out for himself, according to Mr. Smith, a case of involuntary manslaughter, not murder.

"The law," he said, "cites that an accessory must have full knowledge that a crime has been committed, and Conley did not then have that knowledge."

In addition, he said, the record shows that Conley when he wrote the notes did not know to what use they would be put.

The second phase of Mr. Smith's argument was that Conley had gone to the factory that day to assist Frank in a misdemeanor crime, and that as an accessory in a misdemeanor, he became by law a principal.

Therefore, the attorney argued, he had a right to keep his silence about the whole transaction, since he feared it might have involved him as a principal in a misdemeanor.

He cited various cases to support his contention that if a person kept silent about a crime to protect himself, not to shield another person charged with it, that then he would not be guilty as an accessory. He laid particular stress upon a case where a member of the Ku Klux clan had been present at a meeting at which a certain man was appointed to take the life of another. The court held that this man was not guilty as an accessory, because he had kept silent when approached by the authorities simply to protect himself.

CONLEY NO AIDE.

Conley did not assist or protect Franka after the latter had been charged with the crime, Mr. Smith asserted, and because of

this fact he argued that his case did not come under the law concerning an accessory after the fact.

At the conclusion of Mr. Smith’s speech Judge Hill delivered his brief charge and the jury retired. The twelve men had not been in their room more than five minutes when they agreed upon the verdict and reported to the court.

Court stood and in silence heard the court sentence him to twelve months hard labor upon the county chain-gang. As a misdemeanor convict, Conley will serve his time in the Fulton County gang. He will commence service of the sentence probably on Saturday, although it is within the province of the authorities to turn him over to the convict warden of the county immediately.